IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 653

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION, *Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.**

BYNUM E. HINTON,
ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.,
*Attorneys for Petitioner.*

September 26, 1941.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX.

## TABLE OF CASES AND STATUTES.

### Cases.



### Statutes.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION, *Respondents*.

## Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, reversing the order of the United States District Court for the District of Columbia denying respondents' motion to dismiss the complaint herein, treated as a motion for judgment.

## MATTER INVOLVED.

The United States, acting through the Secretary of the Interior, entered into a contract with the respondents, Irwin & Leighton for the construction of a library building (R. 2-3) at the Howard University, a private corporation created under an Act of Congress (R. 170-173). The

building was erected with moneys of the United States allocated by the President of the United States under authority of the National Industrial Recovery Act, infra, pp. 4-5, upon land owned by the University (R. 147-8). As a condition of the contract the Secretary required the respondents to give to the United States a bond with surety in the penal sum of $408,612.00, conditioned for the payment of all persons furnishing labor and material for the work (R. 22-23). The petitioner and other persons who have claims pending in suits below furnished material for use and which was used in the work and for which they have not been paid. They accordingly brought suit in conformity with the procedural requirements of the Miller Act (infra, pp. 2-4). The District Court held that the petitioner was entitled to recover on the bond. The Court of Appeals for the District of Columbia reversed the District Court's judgment and held that the building here involved was not a public work of the United States and that accordingly there could be no recovery upon the bond.

## JURISDICTION.

The jurisdiction of this court rests upon section 240 (a) of the Judicial Code, Act of February 13, 1925, c. 229, 43 Stat., 938. The judgment of the Court of Appeals for the District of Columbia was rendered on July 28, 1941. (R. 183)

The statutes involved are the so-called Miller Act, 40 U. S. C. A., 270 a, b, c, Act of August 24, 1935, c. 642, 49 Stat. 793:

> "270a. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor";
>
> "(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and

in such amount as he shall deem adequate for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

"(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

"(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified, in subsection (a) of this section. (Aug. 24, 1935, c. 642, sec. 1, 49 Stat. 793.)

"270b.

"(a) * * *

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any

costs or expenses of any such suit. (Aug. 24, 1935, c. 642, sec. 2, 49 Stat. 794.)

and the National Industrial Recovery Act of June 16, 1933, c. 90, 48 Stat. 200-210, 40 U. S. C. A., 401-411:

"401. Federal Emergency Administration of Public Works; Creation; Officers and Employees; Exemption from Civil Service Laws and Classification Act; Duration of Laws

"(a) To effectuate the purposes of this chapter, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the 'Administrator'), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers, and employees, and to utilize such Federal officers and employees, and with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to chapter 13 of Title 5, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this chapter to such officers, agents, and employees as he may designate or appoint. * * *

* * * * * * * * * * *

"402. Program of Public Works; Preparation and Contents.

"The Administrator, under the direction of the President, shall prepare a comprehensive program of public works; which shall include among other things the following: * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority, or with public aid to serve the interests of the general public; * * *

* * * * * * * * * * *

"409. Rules and Regulations; Penalty for Violation.

"The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this chapter, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to exceed six months, or both. * * *"

"EXECUTIVE ORDER (No. 6929)

"DELEGATING CERTAIN FUNCTIONS AND POWERS TO THE FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS.

"By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the 'Act'), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

* * * * * * * * * *

"2. To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me. (Promulgated Dec. 26, 1934.)

* * * * * * * * * *

## QUESTIONS.

The questions presented are:

(1) Is this a public work within the meaning of the statute requiring the taking of the bond?

(2) When the Secretary of the Interior, as a contracting officer of the United States, required the respondents to give a bond conditioned for the payment of persons furnish-

ing labor and material for the work, may a court review the propriety of his action and determine that, in the absence of express statutory authority to take such a bond, it is unenforceable and void?

(3) Is it not within the inherent power of the Secretary, as a contracting officer, to take such a bond, and may not the petitioner enforce it as a third party beneficiary without regard to express statutory authorization?

(4) May not the Secretary, as a contracting officer of the United States, and pursuant to his own rule-making authority as Administrator of Public Works, require such a bond to be taken? And when so taken, is it not enforceable?

## REASONS FOR ALLOWANCE.

I. The decision of the Court below is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Peterson v. United States*, 119 F. (2d) 145, decided April 14, 1941, and reported June 2, 1941, holding that the term "public work" as used by Congress is "without technical meaning and is to be understood in its plain, obvious and rational sense."

II. The court below failed to give proper effect to the decision of this court in *Perkins v. Lukens Steel Co.*, 310 U. S. 113, holding that the terms and conditions of public contracts as drawn by the administrative branch of the government are not subject to judicial supervision.

III. The court below failed to give recognition to the necessarily inherent power of an administrative officer to make provision in a public contract for payment to labor and material suppliers, as a proper incident of the authority to contract, without regard to express statutory direction.

Respectfully submitted,

BYNUM E. HINTON,
ALEXANDER M. HERON,
*Attorneys for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No.

UNITED STATES OF AMERICA, TO THE USE OF NOLAND COMPANY, INCORPORATED, A CORPORATION, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, TRADING AS IRWIN AND LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, A CORPORATION, *Respondents*.

## BRIEF.

### OPINIONS BELOW.

Neither the opinion of the District Court (R. 7) nor the Court of Appeals (R. 177-182) is reported as yet.

### STATEMENT OF CASE.

In addition to the facts set out in the petition it should be pointed out that by an Act of Congress of December 13, 1928, 45 Stat. 1021, (R. 173) the Howard University is subject to annual inspection by the Bureau of Education, and a yearly report making a full exhibit of the affairs of the University is presented to Congress annually. The University in these respects is perhaps anomalous in its relation to the Federal Government. More than one-half of its annual operating expenses for the years 1935, 1936, 1937 were contributed by the United States (R. 157). Only one

building was erected at the University with private funds since 1910 (R. 168). The United States contributed upwards of three million five hundred thousand dollars for buildings at the University between 1933 and 1939 (R. 169) and all of this from Public Works funds (R. 167).

## SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In holding that the library building was not a public work of the United States within the meaning of the Miller Act.

(2) In undertaking to review the authority of the contracting officer of the United States to take the bond here sued upon.

(3) In denying the inherent authority of the contracting officer to take this bond as an incident of his power to contract on behalf of the United States.

(4) In denying the petitioner a right of recovery upon the bond as upon a private obligation for the benefit of a third party.

## ARGUMENT.

### I. The Decision Below Conflicts with that of the Court of Appeals for the Sixth Circuit Under Which this Building Would be a "Public Work."

In *Peterson v. United States*, 119 F. (2d) 145, the Circuit Court of Appeals for the Sixth Circuit held that where a contract is entered into by the United States for the construction of a tunnel upon property apparently belonging to a privately owned public service corporation operated for the profit of its shareholders, the Pennsylvania Railroad Company, the work is nevertheless sufficiently a public work within the meaning of the statute to permit recovery upon the bond taken by the United States to secure payment for labor and materials, even though the ownership was at no time in the United States. The work in the *Peterson*

case was an incident of a flood prevention program carried out by the Public Works Administrator in conjunction with a water district incorporated under the laws of Ohio.

The court below has held that where a contract was entered into by the United States for the building of a library building upon land owned by an educational institution chartered by Congress (170-3) and to a considerable extent subject to supervision by the United States (R. 173), the work was not a public work, and that there could be no recovery upon the bond taken by the United States to secure payment to persons furnishing labor and material for the building. The two decisions are in obvious conflict and point the way to greater and almost hopeless confusion in future decisions, since the character of work carried on by the Public Works Administration with the three billion three hundred million dollar fund which was at its disposal is of the most varying kind and scope. The work which was being performed in each of these cases was under the authority of the Public Works Section of the National Recovery Act. Under the two decisions as now standing, Federal Courts will be left to pick and choose as to whether they think the particular work involved is sufficiently used in public service to justify enforcing the provisions of the bond. Obviously such a situation ought not to be permitted.

The Court of Appeals for the Sixth Circuit has taken a broad view of the term "public work" and in effect has upheld the authority of the administrative officers in taking bonds similar to the one involved in this case. The court below has taken a narrow and historical view, concluding that unless the work were actually owned by the United States it was not "public" within the meaning of the statute. If the administrative officer charged with the enforcement of the statute has taken the bond, his action should be sustained, and especially is this true where consideration has been paid for the bond which by its plain term is an engagement solely to protect furnishers of labor and material.

The Court of Appeals for the Sixth Circuit in the *Peterson* case said:

> "The term 'public work' as used in the act is without technical meaning and is to be understood in its plain, obvious and rational sense. The Congress was not dealing with mere technicalities in the passage of the Act in question. 'Public work' as used in the Act includes any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds. Undoubtedly the work of flood control and the promotion of commerce among the states, by the improvement of rivers and harbors, is public so far as it promotes a public object. From the standpoint that it promotes the benefit of a privately owned railroad, it is in a sense, private, but nonetheless public, although incidentally promoting private advantage.
>
> * * * *
>
> "The case of Title Guaranty & Trust Company v. Crane Company, 219 U. S. 24, 35, 31 S. Ct. 140, 55 L. Ed. 72, so strongly relied on by appellants, is without point. In that case, the court was considering the applicability of the statute to a contract, to secure which the bond was given, for the construction and delivery of a single screw wooden steamer for the United States. The surety there was attempting to confine the phrase 'public work' to structures of permanent nature attached to the soil which was its then understood meaning. The Supreme Court extended the phrase to cover any class of property belonging to the representative of the public whether or not attached to the soil. There is nothing in the opinion from which an inference may be drawn that ownership was the sole criterion. To so circumscribe the act would destroy its purpose. Many of the public works of the United States are on property which the United States is using temporarily. The case of Maiatico Construction Company v. United States, 65 App. D. C. 62, 79 F. 2d 418, also relied on by appellants, has no application. In that case, the United States contracted for the erection of three dormitory buildings of the Howard University, a private corporation. The Government had no title or interest in the

property and the school was not for public use, although it may have been remotely for public benefit.

"In recent years, enormous expenditures for public works have been made partly for the projects themselves as in the case at bar, but mostly to reduce unemployment and to stimulate business. However, there is no reason why mechanics, laborers and materialmen who do work, or furnish supplies on such projects as fall within the puryiew of the statute in question, should not have its benefits. In our opinion, the present improvements were 'public work' within the meaning of the act, and the bond, the subject of this action, a valid and enforceable obligation."

The distinction suggested by the Circuit Court of Appeals for the Sixth Circuit between its decision and *Maiatico Construction Co.* v. *United States*, 65 App. D. C. 62, 79 F. (2d) 418, that the Howard University was only "remotely for public benefit" is little more than a contribution to judicial courtesy. The sole purpose of the University is "* * * for the education of youth in the liberal arts and sciences * * *" (R. 170).

The Miller Act involved here is a substitute for the Heard Act of August 13, 1894, c. 280, 28 Stat. 278, 40 U. S. C. A. 270, as amended, and is subject to the same liberality of interpretation to accomplish its purpose. *Fleisher Engineering & Construction Co.* v. *United States*, 311 U. S. 15.

The view taken by the District Court was that since under the Industrial Recovery Act the construction of this library building was authorized as a part of the program of "public works" then that term as used in the subsequently enacted Miller Act must be understood to include this building. (Opinion of the District Court R. 7.) This is further supported by the statement of Congressman Duffy in the hearing on the Miller Act (R. 109):

"If this bill were passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance."

## II. The Action of the Secretary of the Interior in Taking the Bond is Not Subject to Judicial Review.

The court below held that since the title to the land on which the library building was erected was not in the United States, but in the Howard University, it was not a public work within the historically accepted meaning of that term, and the Secretary of the Interior was in error in so considering it and in taking a bond pursuant to the Miller Act. The Miller Act is a directory statute requiring contracting officers of the United States to take such bonds, along with bonds to secure the performance of the contract, where contracts are entered into for the construction of public works of the United States. The conclusion so reached is contrary to the decision of this court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, in which it was decided that the action of a contracting officer in carrying out a statutory direction of the Congress as to the terms upon which public contracts are to be made, is not subject to judicial review. Such statutory provisions are in substance the directions of a principal to an agent, and if erroneously construed by the agent are to be corrected by the principal and not by the court. In the *Lukens Steel Company* case this court held that an interpretation of such a directory stafute, made by an administrative officer, although apparently contrary to all historical concept of the terms used in it, was not subject to the injunctive order of the courts at the instance of prospective bidders. In the *Lukens* case the judicial review was sought prior to the making of the contract. In the present case the contract was made, the bond given, and now the contractors deny its validity. If the decision of the court below is to stand, the effect of the decision in the *Lukens* case is nullified, for the contractor, instead of questioning the contract terms beforehand, may enter into it, and then refuse, with impunity, to abide by its terms.

It is held in the *Lukens* case that the terms and conditions upon which the Government contracts are exclusively a matter for administrative determination, subject to such direc-

tion as may be given by the Congress. Determination of the conditions upon which public contracts are to be let is not a part of the judicial function. It is idle to say that they are not subject to judicial veto before the contract is let, but may be subject to such veto afterwards.

The court below felt that uncertainty would result in the present case if a broader meaning were given to the term "public work". Surely there could be no greater uncertainty so far as the laborer or material furnisher is concerned than to discover that the plain but solemn obligation of the contractor to pay for the labor and material was unenforceable because of the remote fact that title to the land on which the building was constructed was not in the United States.

The view taken by the Department is found in the memorandum of the Solicitor (R. 26-28). It is that the taking of the bond is authorized under the regulatory power delegated to the Administrator of Public Works by the President pursuant to the Industrial Recovery Act. This was done by Executive order of the President No. 6929 (*supra* p. 5). The Administrator requires these bonds in all cases where the United States is party to the contract (R. 145-152, 30-31). The Department apparently continues to take these bonds.

## III. The Obligation of the Bond Should Be Enforced Whether Within or Without the Confines of the Miller Act.

The bond given in the case (R. 22, 23) standing above is fully enforceable as a private obligation. It is a simple instrument requiring payment for all labor and material. Undoubtedly the Secretary, as a contracting officer of the Government, had inherent authority to require such a bond as a condition of the contract. It is mere incident of a building contract; such bonds are used in private business with increasing frequency. *McClare* v. *Massachusetts Bonding and Insurance Co.*, 266 N. Y. 371, 195 N. E. 129;

*Aetna* v. *Big Rock*, 180 Ark. 1, 20 S. W. (2nd) 180; *Bryan* v. *Page*, 109 Conn. 256, 146 Atl. 293. The right to recovery as a third party beneficiary upon such a sealed instrument had been previously recognized by the court in *Brackner-Mitchell* v. *Sun Indemnity Company*, 65 App. D. C. 178, 82 F. (2nd) 434. The court below seems to doubt the authority of the officer to take such a bond outside of the statute, although it had been conceded before. *Maiatico Construction Co.* v. *U. S.*, 65 App. D. C. 62, 79 F. (2nd) 418. The Miller Act compels contracting officers to take such bonds in all cases coming within its terms, while in Section 270 a (c) there is an express recognition of the authority of the officer to take bonds in cases other than those specifically enumerated.

> "(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, c. 642, sec. 1, 49 Stat. 793)."

The printed bond form carries at its head a reference to the Miller Act, although no such reference is contained in its provisions. The court below was apparently of the view that if the bond were intended by the contracting officer to be a statutory bond, and it did not in fact come within the express terms of the statute, it could be given no recognition as representing the exercise of authority inherent in the officer without regard to the statute. It is submitted that this view is untenable, for if the courts are to inquire as to the source of authority under which the officer *believed* he was acting, only confusion can result. If the officer had the authority from any source, then his action in making the contract should be sustained.

It should be pointed out that the effect of the decision below is not only to strike down the payment bond in suit, but also to strike down the bond which the Secretary took to protect the United States against the consequence of

the respondents' default under the contract (R. 24, 25). Both bonds were taken under the same circumstances. The respondents actually paid their surety $8,172.25 as a premium for the two bonds (R. 26) and presumably this item is reflected in the contract price which the United States paid for the work.

The court below in denying the petitioner's argument that the action might be maintained as upon a private obligation, did so in part upon the ground that the complaint was brought in the name of the United States and otherwise conformed to the procedural requirements of the Miller Act. But all the facts necessary to sustain the action as upon a private obligation are set out in the complaint. The new rules certainly have enough elasticity to permit amendment by striking out the United States as the nominal plaintiff. It was to cover just such ritualistic objections that much of the changed procedure was devised. The petitioner had no choice but to proceed as upon a statutory bond, for if it did not, and the court ultimately determined that it was a statutory bond, then the action would fail for want of observance of the procedural requirements. The lower court commented that the surety was a non-resident, but as the surety has a resident process agent in the District of Columbia, this point has no bearing on the case nor was it raised by the parties.

## CONCLUSION.

This work is a "public work" within the meaning of the statute as interpreted by the Court of Appeals for the Sixth Circuit and the District Court in this case. If the decision below is to stand, the result is that the United States in spending their own money to erect a building may not require the contractor to see to the payment of the labor and materials used in it and may not even take a bond to safeguard themselves against the contractor's failure to com-

plete, and all of this in the face of section 270 a (c) of the Miller Act expressly recognizing the authority of the contracting officer to require just such protection.

It is submitted that the writ should issue as prayed.

Respectfully,

BYNUM E. HINTON,
ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.,
*Attorneys for Petitioner.*

September 26, 1941.